CANON KABUSHIKI KAISHA

v.

GREEN CARTRIDGE COMPANY (HONG KONG) LTD

PRIVY COUNCIL, HONG KONG
LORD BROWNE-WILKINSON
LORD LLYOD OF BERWICK
LORD HOFFMANN
LORD HOPE OF CRAIGHEAD
LORD HUTTON
[PRIVY COUNCIL APPEAL NO: 75 OF 1996]
30 APRIL 1997

TRADEMARKS: *Infringement of - Copyright - Drawings of parts of cartridges - Whether defendant's manufacture of replacement toner cartridges for use in plaintiff's laser printers and photocopiers infringed plaintiff's copyright in drawings of parts of cartridge - Whether defendant could rely on spare parts exception to plaintiff's copyright - Factors to be considered - Repairs that ordinary man would assume he could do for himself without infringing manufacturer's rights - Interests of consumers if plaintiff allowed to monopolise aftermarket by means of copyright - Whether toner cartridge a 'spare part' within meaning of exception - Whether replacement of cartridge analogous to 'repair' of laser printer*

This is an appeal by the plaintiff who brought an action against the defendant for an infringement of the plaintiff's copyright in drawings of parts of cartridges used with the plaintiff's photocopiers and laser printers. The defendant was a manufacturer of new cartridges which were compatible for use in the plaintiff's machines. Those cartridges contained parts the drawings of which the plaintiff held the copyright. The plaintiff commenced proceedings for the infringement of the patents which it held in respect of parts of the cartridge and for the infringement of copyright in the drawings from which 48 nos of the parts for the cartridge had been made.

The trial judge held that the manufacture of the cartridges had infringed the plaintiff's copyright and was not within the scope of the spare parts exception enunciated by the House of Lords in *British Leyland Motor Corporation Ltd v. Armstrong Patents Co Ltd* [1986] AC 577, ie. that an owner of a vehicle had an inherent right to repair his vehicle, and that right prevailed over the manufacturer's copyright in relation to the spare parts of the vehicle. On appeal, the Court of Appeal held that certain patents were valid and had been infringed and granted injunctions and ancillary relief. Leave to appeal on this aspect was refused by the Board. As for the infringement of copyright, the

majority of the Court of Appeal held that the manufacture of catridges fell within the scope of the spare parts exception. This is an appeal by the plaintiff against that decision.

Held:
Per Lord Hoffmann

[1] The basis of the decision in *British Leyland* rested upon two features. First, the analogy with the kind of repair which the ordinary man who buys an article would unquestionably assume that he could do for himself (or commission someone else to do) without infringing any rights of the manufacturer, and secondly, the assumption that the exercise of monopoly power in the aftermarket by means of copyright would unquestionably operate against the interests of consumers.

[2] The *British Leyland* spare parts exception is not founded upon any principle of the law of contract or property. It is an overriding public policy, namely the need to prevent a manufacturer from using copyright in order to control the aftermarket in spare parts.

[3] The jurisprudential and economic basis for this doctrine becomes extremely fragile when the facts of unfairness to the customer and the anti-competitive nature of the monopoly are not in issue. Thus in the present case, the analogy with repair and the shifting of competition as they applied to photocopier cartridges had to be considered.

[4] The cartridge would be replaced at a stage when nothing in the photocopier required repair. The element of preventive maintenance was not a viable argument as it involved parts that were relatively small, so that there would be a point, when so little of the replacement could be described as repair. Thus the analogy with repair ceased to be plausible.

[4a] On the competition aspect of the matter, given the relative importance of the cost of cartridges as a propotion of the lifetime cost of the photocopier or laser printer, it would be difficult without evidence to make the assumption that competition in the market for the photocopier or laser printer would not prevent anti-competitive practice in the aftermarket.

[5] There was competition in the aftermarket between the plaintiff and refillers of the plaintiff's empty cartridges. It could not therefore be assumed without evidence that the exercise of its intellectual property rights was giving the plaintiff a monopoly position, or that the position was being abused.

[6] Their Lordships were accordingly of the opinion that the features of unfairness and abuse of monopoly power which underlay the decision in *British Leyland* could not be said to be plainly and obviously present in this case.

[Appeal allowed.]

Cases referred to:
Birmingham, Dudley and District Banking Co v. Ross [1888] 38 Ch D 295 ***(cit)***
British Leyland Motor Corporation Ltd v. Armstrong Patents Co Ltd [1986] AC 577 ***(refd)***
Burke and Margot Burke Ltd v. Spicers Dress Designs [1936] Ch 400 ***(refd)***
Dennison Manufacturing Co v. Alfred Holt & Co Ltd [1987] 10 IPR 612 ***(refd)***
Dorling v. Honnor Marine Ltd [1965] Ch 1 ***(cit)***
Eastman Kodak Co v. Image Technical Services Inc [1992] 504 US 451 ***(cit)***
King Features Syndicate Inc v. O and M Kleeman Ltd [1941] AC 417 ***(cit)***
LB (Plastics) Ltd v. Swish Products Ltd [1979] RPC 551 ***(cit)***
Solar Thomson Engineering Co Ltd v. Barton [1977] RPC 537 ***(refd)***
Thomas v. Sorrell [1674] Vaughan 330 ***(cit)***

Legislation referred to:
Copyright Act 1956 [UK], ss. 1(1), (11), 3(5)(a)

Other sources referred to:
Car Parts House of Commons Paper No. 318 Session 1981-1982
Systems Competition and Aftermarkets: An Economic Analysis of Kodak (1994) 39 The Antitrust Bulletin 135, Shapiro & Teece

Reported by Anne Khoo

JUDGMENT

Lord Hoffmann:

The issue in this appeal is the scope of the spare parts exception recognised by the House of Lords in *British Leyland Motor Corporation Ltd. v. Armstrong Patents Co. Ltd.* [1986] AC 577. In particular, the question is whether that doctrine entitles the defendant to infringe the plaintiff's copyright in drawings of parts of the cartridges used with its photocopiers and laser printers.

It is first necessary to explain the part played by the cartridges in the operation of the plaintiff's machines. Both photocopiers and laser printers use the same relatively simple technology. A discharge from a corona wire charges the surface of a rotating drum so that in the absence of light the charged surface acts as an insulator. Light in the form of a reflected image of the item to be photocopied or a laser generated by a computer selectively discharges the insulating surface so as to create a latent image on the drum. Electrostatically

charged particles of toner are brought into proximity to the drum and adhere to the latent image, thereby creating a visible image. The image is then transferred to a sheet of paper brought into contact with the drum and passed through a heater to fix the toner particles. Finally, the drum is discharged and cleaned of excess toner.

During the lifetime of the machine, various of the components will need to be replaced. First and most obviously, the supply of toner will need to be renewed. The corona wire may fail, the drum may become scratched or dirty and the blade which cleans it may have to be replaced. Seals and other moving parts may break. A disadvantage of early models was that the replacement of toner was messy and the replacement of other parts by expert technicians expensive. The plaintiff therefore hit on the idea of including a supply of toner and all the parts which might need replacement in a single disposable plastic cartridge. Besides the toner reservoir, it contains the corona wire, the drum and the wiper blade. When the toner gives out, the owner of the machine simply puts in a new cartridge and thereby at the same time renews the other parts. He does not have to mess with toner or call in an expert. The plaintiff has carefully chosen the cartridge materials to ensure that the various parts will usually function for at least as long as the toner lasts. It would be wasteful if they were made to function for much longer because the cartridge is usually discarded when the toner is used up.

The aftermarket (as it is called) in cartridges contributes a significant part to the plaintiff's profits. The defendant's business plan, prepared when it decided to enter the market in 1990, analysed the lifetime cost of one of the plaintiff's typical desktop laser printers as follows. The initial cost was US$1,700. During a projected life of 5 years or 200,000 copies, the owner would need about 62 cartridges at $120 each, involving a further expenditure of $7,500.

Although the aftermarket is dominated by the plaintiff's sales of new cartridges, there is also in Hong Kong a cottage industry of refilling used cartridges. These naturally vary a good deal in quality. In some cases the refiller does no more than that; there is a risk that toner may leak or parts may fail during the second use. Others do a more professional job and replace the parts most at risk. But most of the cartridge, particularly the plastic casing and similar parts, will not need replacement. The plaintiff has never objected to the refillers, even though some use spare parts which are not of the plaintiff's manufacture. The defendant's evidence was that in Hong Kong the refillers had 40% of the market.

The defendant started in business as a superior refiller, hoping to build up a large turnover selling high-quality refilled cartridges at prices less than those of the plaintiff but higher than those of cottage refillers. It found however

that inability to obtain enough empty cartridges squeezed its volume and a reduction in prices by the plaintiff squeezed its margins. It therefore decided that the only way to make money was to manufacture new cartridges and sell them both in Hong Kong and for export in competition with those of the plaintiff.

The plaintiff commenced proceedings for infringement of certain patents which it held in respect of parts of the cartridge and for infringement of copyright in the drawings from which 48 of the parts for the cartridge had been made. The Court of Appeal (varying the order of Rogers J) held certain patents valid and infringed and granted injunctions and ancillary relief. Their Lordships' Board has refused leave to appeal on this aspect of the case and no more need be said about it. As for infringement of copyright, it is conceded that the plaintiff was entitled to artistic copyright in the drawings from which the 48 parts were made. Accordingly, by ss. 1(1) and 3(5)(a) of the (U.K.) Copyright Act 1956 (which is extended to Hong Kong by the Copyright (Hong Kong) Order 1972) (S.I. 1972 No. 1724) the plaintiff has the exclusive right to reproduce the drawings in any material form.

In the Courts of Hong Kong it was accepted, in view of the decisions of the House of Lords in *L.B. (Plastics) Ltd v. Swish Products Ltd.* [1979] RPC 551 and *British Leyland Motor Corporation v. Armstrong Patents Co. Ltd.* [1986] AC 577, that the manufacture of the parts by the defendant by reverse engineering from the plaintiff's parts was an indirect reproduction in three-dimensional form of the drawings from which the parts had been made. The Board was invited to depart from these decisions of the House of Lords and say that the copying of functional three-dimensional objects is not an indirect reproduction of the drawings. But their Lordships indicated in the course of argument that they were unwilling to do so. It appears to their Lordships that a strong case can be made for saying that the earlier authorities, starting with *Dorling v. Honnor Marine Ltd.* [1965] Ch. 1 and ending with *L.B. (Plastics) Ltd. v. Swish Products Ltd.* [1979] RPC 551, did not sufficiently distinguish between the reproduction of an artistic work, whether in two-dimensional or (as in *King Features Syndicate Inc. v. O. and M. Kleeman Ltd.* [1941] AC 417) in three-dimensional form, and the use of the information contained in an artistic work such as a drawing or diagram (together with any additional text) as the instructions for making a three dimensional object which, although plainly derived from that information, does not reproduce the artistic work: see *Burke and Margot Burke Ltd. v. Spicers Dress Designs* [1936] Ch. 400. But however that may be, their Lordships think that it is far too late to depart from the construction which has been given to the Copyright Act 1956 by the earlier cases. The question of whether the House of Lords should depart from *L.B. (Plastics) Ltd. v. Swish Products Ltd.* [1979] RPC 551 was carefully

considered in *British Leyland;* the dissenting speech of Lord Griffiths at pp. 645-657 attracted the sympathy of at least three other members of the House. But the decision was nevertheless taken to follow the earlier cases. The Board is therefore faced not merely with the decision as to whether it should depart from *L.B. (Plastics) Ltd. v. Swish Products Ltd.* but with the second-order question of whether it should depart from the decision in *British Leyland* not to depart from the earlier decision. Their Lordships consider that there are strong reasons for not doing so. First, the artistic copyright is intellectual property which can be sold, licensed and otherwise dealt with. Since *British Leyland,* if not some earlier date, there must have been many dealings in such rights of property on the assumption that the rights conferred by the copyright were as extensive as the House of Lords had said. It would therefore be wrong retrospectively to invalidate that assumption. Secondly, and as to the future, the matter is under consideration by the Legislative Council. The Law Reform Conunission published a report on copyright in January 1994. The Government published a consultation paper and draft Bill in November 1996. A Bill was put before the Legislative Council in February 1997. It is therefore open to the Hong Kong legislature to restrict or preserve the artistic copyright recognised in *British Leyland* and inappropriate for this Board to undertake the task of reforming the construction of a statute which shortly will no longer be in force.

Their Lordships therefore turn to the main question in the appeal, which is the scope of the spare parts exception. The question, on which a majority of the Court of Appeal differed from the trial Judge, is whether the manufacture of Cartridges falls within the principle of that exception. Rogers J thought that it did not and a majority of the Court of Appeal thought it did. In order to answer that question, it is first necessary to decide what the principle was. This, as will appear, is no easy matter.

The exception was discussed in the speeches of Lord Bridge of Harwich at pp. 615-628 and Lord Templeman at pp. 628-645. Their reasoning was not entirely congruent. Lord Bridge began by considering cases on patents in which it had been said that the purchaser of a patented article had an implied licence to keep it in repair. So in *Solar Thomson Engineering Co. Ltd. v. Barton* [1977] RPC 537, 555, Buckley LJ said:

> The cardinal question must be whether what has been done can fairly be termed a repair, having regard to the nature of the patented article. If it is, any purchaser of such an article, whether from the patentee ... or from a purchaser from the patentee ... is impliedly licenced to carry it out or to contract with someone else to carry it out for him: ...

Their Lordships would observe that the concept of a licence, namely something which "makes an action lawful which without it had been unlawful" (*Thomas v. Sorrell* [1674] Vaughan 330, 351) is not really applicable to the repair of a patented article. Because repair is by definition something which does not amount to the manufacture of the patented article, it is not an infringement of the monopoly conferred by the patent. It cannot therefore be an unlawful act and needs no special licence to make it lawful, unless as part of a general implied licence to use the patented product at all, which is sometimes used to explain why mere user does not infringe the patentee's monopoly. But this is perhaps better regarded as a consequence of the exhaustion of the patentee's rights in respect of the particular article when it is sold. In *Solar Thomson*, however, (at pp. 560-561) the Court of Appeal extended the concept into the field of copyright by holding that a purchaser of an article is impliedly licenced to infringe the owner's copyright in drawings of parts of that article so far as is necessary to enable repairs to be carried out. This is a genuine implied licence since, without it, the reproduction of the parts would be unlawful.

Lord Bridge did not however find the concept of a licence helpful in *British Leyland* at p. 625. It has obvious difficulties of transmission in a case in which the person infringing copyright is not the purchaser of the article, or his successor in title, or acting on his behalf, but an independent third party manufacturing spare parts for sale on the market. It was for this reason that it was rejected as a defence by the Court of Appeal in *British Leyland* [1986] RPC 279, 298 (Oliver LJ); 313-314 (Fox LJ). No doubt Lord Bridge accepted the reasoning of the Court of Appeal on this point.

Instead, Lord Bridge said at p. 625 that the owner of a car:

> ... must be entitled to do whatever is necessary to keep it in running order and to effect whatever repairs may be necessary in the most economical way possible.

This was a right "inherent in the ownership of the car itself". In the case of an exhaust pipe, he could exercise this right by producing a copy himself or instructing someone else ("the local blacksmith") to do so. But in practical terms, the "right to repair" could be of value only if other people could manufacture copy exhausts which the motorist could acquire "in an unrestricted market". Thus there was a "clear'conflict of legal rights"; the owner's right of repair and the manufacturer's copyright. The question was which right "should prevail over the other". In Lord Bridge's view, it was the right of the owner.

This reasoning involves a somewhat unorthodox extension of what would normally be understood by the inherent right to repair one's motor car. Of course one has a right to repair one's car, as one has the right to cultivate one's garden and indulge in all kinds of harmless activities. But such a right is not usually treated as entitling one to invade the property rights of others; for example, by taking a neighbour's dahlias on the ground that this is the most economical way of going about it. It is hard to see why the appropriation of intellectual property rights should be any different. Indeed, so much is in principle acknowledged by Lord Bridge at p. 628 when he says that the right to repair would not ustify the infringement of patents or registered designs. He distinguished these forms of intellectual property as "truly and expressly monopolistic". It must however be noted that s. 1(1) of the Copyright Act 1956 expressly confers "the exclusive right ... to do, and to authorise other persons to do" the acts restricted by the copyright in the various works. This looks for all practical purposes like a monopoly; indeed, most of the reasoning in *British Leyland* proceeds on the basis that it confers unacceptable monopoly rights. It is hard to escape the conclusion that although Lord Bridge felt driven to accept that Parliament had created intellectual property rights which covered the manufacture of three-dimensional parts by reverse engineering, he felt free to remedy what he saw as a legislative error by treating such rights as an inferior species of property which could be subordinated to the right to repair one's motor car. Such prepotency over statute has not yet been accorded in this country even to human rights such as free speech.

Lord Templeman at pp. 628-645 approached the question somewhat differently. He found an analogy in the principle that a grantor may not derogate from his grant. The manufacturer, having sold the car, should not be entitled to derogate from his grant by using his copyright to prevent the owner from buying a spare exhaust in the open market. The principle of non-derogation is however based upon the presumed intention of the parties. The rights derived from the principle must, as Bowen LJ said in *Birmingham, Dudley and District Banking Co. v. Ross* [1888] 38 Ch.D. 295, 313, have a consensual origin. It is the conveyancing equivalent of an implied term derived, in a broad sense, from the construction of the transaction into which the parties have entered. In the case of the sale of a motor car, it is not easy to say what terms could be implied about the existence of intellectual property rights which restricted the market in spare parts. One can however safely say that the notional parties are unlikely to have received the suggestion that it was to be restricted by patents and design rights but not by copyright with a common "of course". This concept of non-derogation from grant would also suggest that if it was made clear to the purchaser that he was buying the motor car subject to the manufacturer's continuing copyright in the drawings of the parts, no question

of non-derogation could arise. But Lord Templeman at p. 643 regarded the right to repair as inalienable:

> Every owner of a car has the right to repair it. That right would be useless if suppliers of spare parts were not entitled to anticipate the need for repair. The right cannot, in my view, be withheld by the manufacturer of the car by contract with the first purchaser and cannot be withheld from any subsequent owner.

This is something quite different from non-derogation from grant as understood in the law of property.

Their Lordships think the *British Leyland* spare parts exception cannot be regarded as truly founded upon any principle of the law of contract or property. It is instead an expression of what the House perceived as overriding public policy, namely the need to prevent a manufacturer from using copyright (as opposed to patents or design right) in order to control the aftermarket in spare parts. This appears clearly from the emphasis on the need for an "unrestricted market" as opposed to the right of the manufacturer to "use his copyright in such a way as to maintain a monopoly in the supply of spare parts" (Lord Bridge at p. 625) and the danger of the car owner who "sells his soul to the company store" being enmeshed in the "tentacles of copyright" (Lord Templeman at pp. 628-629).

It is of course a strong thing (not to say constitutionally questionable) for a judicially-declared head of public policy to be treated as overriding or qualifying an express statutory right. Their Lordships therefore think that the prospect of any extension of the *British Leyland* exception should be treated with some caution. The question of whether it is contrary to the public interest for a manufacturer to be able to exercise monopoly control over his aftermarket cannot usually be answered without some inquiry into the relevant market. For example, if customers are in a position to reckon the lifetime cost of one product (including purchases such as cartridges which will have to be made in the aftermarket) as against the lifetime cost of a competing product, then control of the aftermarket will not be anticompetitive. A manufacturer who charges too much for his cartridges will sell less of his machines. The figures which their Lordships have already quoted for expenditure on the machine itself and on cartridges make it likely that purchasers with any degree of sophistication will be comparing machines on a lifetime cost basis.

Furthermore, the ability to control the aftermarket and price the machines on the assumption that the purchasers will buy one's cartridges may actually enhance competition and provide greater choice to consumers, because it will enable manufacturers to compete not only on quality and price but also on the way they divide the cost of their products between the initial outlay and

the aftermarket. For example, as Rogers J pointed out, expenditure in the aftermarket may be treated by the tax authorities as revenue costs and more fully deductible than the capital cost of the machine. Thus a manufacturer who prices the machines lower and the cartridges higher may secure a competitive advantage as against a rival who charges the same lifetime cost in different proportions.

It is not necessary for the purposes of this appeal to form any view on whether the existence of copyright is capable of giving the plaintiff such economic power in the aftermarket as to be anticompetitive and contrary to the public interest. It is sufficient to recognise that the question is a complicated one which cannot be solved by broad generalisation. The Courts are ill-equipped to .pronounce upon such matters, which often involve questions of economic policy and are generally left to specialised bodies such as the Monopolies and Mergers Commission: see, for example, the report of the MMC on Car Parts (House of Commons Paper No. 318 Session 1981-1982) and compare the sophisticated economic arguments deployed in the judgment of the Supreme Court of the United States in *Eastman Kodak Co. v. Image Technical Services Inc.* [1992] 504 US 451 and comments by Shapiro and Teece, Systems competition and aftermarkets: an economic analysis of Kodak (1994) 39 The Antitrust Bulletin 135.

These unusual features of the reasoning in *British Leyland* make it difficult to pick out any particular phrase in the judgments as encapsulating a general principle. Mr. Thorley QC, who appeared for the defendant, relied upon Lord Bridge's statement at p. 625 that the owner of a car "must be entitled to do whatever is necessary to keep it in running order". A supply of cartridges was, he said, necessary to keep the photocopier in running order and therefore the owner of a photocopier was entitled to the existence of an unrestricted market in which he could buy cartidges. Their Lordships think that this reasoning, which appears to have attracted the majority of the Court of Appeal, amounts to treating a single phrase of Lord Bridge as if it were an amendment to the Copyright Act 1956 and is far too simplistic. Likewise it was suggested that the question turns upon whether the cartridge can properly be regarded as a separate entity or as an accessory part of a larger entity, namely, the photocopier. Since for most ordinary purposes the latter is certainly the more plausible view, it was said that replacement of the accessory entity must constitute "repair" of the larger. A *reductio ad absurdum* of this approach is shown by the New Zealand case of *Dennison Manufacturing Co. v. Alfred Holt & Co. Ltd.* [1987] 10 IPR 612. The plaintiff manufactured plastic tags for attaching price labels to garments and a gun which could be loaded with a supply of tags and used to shoot the tag through the material of the garment. The defendant claimed to be entitled to make tags infringing the plaintiff's

copyright on the *British Leyland* principle, saying that the tags were accessories necessary to keep the gun supplied and in working order. No doubt this was true, but the absurdity of treating this physical relationship as conclusive was shown by the fact that the plaintiffs actually gave the guns away for nothing and made their money from selling the tags. Their Lordships think it would reflect no credit upon the law if a doctrine which obviously rests heavily upon economic assumptions were to be applied in so mechanistic a fashion.

The basis of the decision in *British Leyland* appears to their Lordships to rest upon two features. First, a compelling analogy with the kind of repair which the ordinary man who bought an article would unquestionably assume that he could do for himself (or commission someone else to do) without infringing any rights of the manufacturer. This is the rhetorical force of Lord Bridge's reference at p. 625 to the blacksmith. Secondly, an assumption that the exercise of monopoly power in the aftermarket by means of copyright would unquestionably operate against the interests of consumers. This appears from Lord Templeman's references at pp. 628-629 to the customer selling his soul, the tentacles of copyright and his mention at p. 641 of the Report of the Monopolies and Mergers Commission on the refusal of the Ford Motor Company Limited to grant licences for the manufacture of certain replacement body parts (Cmnd. 9437, February 1985), which he said had "stigmatised" the company's conduct as anticompetitive.

Their Lordships consider that once one departs from the case in which the unfairness to the customer and the anticompetitive nature of the monopoly is as plain and obvious as it appeared to the House of Lords in British Leyland, the jurisprudential and economic basis for the doctrine becomes extremely fragile. They must accordingly examine the strength of the arguments from analogy with repair and the stifling of competition as they apply to photocopier cartridges.

It seems plain that the analogy with repair is far weaker. The cartridge will usually be replaced at a stage when nothing whatever in the photocopier requires repair. It will simply have run out of toner. It is true that there can be said to be an element of preventive maintenance: items like the drum and wiper blade are replaced because there is a distinct possibility that they may give out at some time in the near future. But these items form only a relatively small (though important) part of the unit which is being replaced. Mr. Thorley said that in *British Leyland* it was assumed that the exception permitted the manufacture of entire exhaust assemblies, even though parts (like the muffler) might still be serviceable. The point was not debated in *British Leyland* but it can be fairly be assumed in Mr. Thorley's favour that the House did not regard this feature as taking the product outside the repair analogy. But one

cannot use this as a base from which to extend the analogy still further: there comes a point when so little of the replacement can be described as repair or even in lieu of repair that the analogy ceases to be plausible.

On the competition aspect of the matter, the present case seems to their Lordships for two reasons far weaker than *British Leyland*. First, the cost of a replacement exhaust, even at two-yearly intervals during the life of the vehicle, is relatively small in relation to the capital and other running costs of the vehicle. The House of Lords appears to have assumed, with some support from contemporary reports of the Monopolies and Mergers Commission, that purchasers were unlikely to adopt "lifetime costing" in assessing the relative attractions of rival makes of vehicles and that competition in the market for the cars themselves would not therefore prevent anticompetitive practices in the aftermarket. In the present case, given the relative importance of the cost of cartridges as a proportion of the lifetime cost of the photocopier or laser printer, it would be impossible without evidence to make such an assumption. Secondly, there is already competition in the aftermarket between the plaintiff and the refillers. It cannot therfore be assumed without evidence that the exercise of its intellectual property rights is giving the plaintiff a monopoly position, let alone that the position is being abused. Mr. Thorley said that customers did not have a complete choice because the products of the refillers were inferior and sometimes very inferior. But even if the refill products cannot be regarded as completely substitutable for the plaintiff's products, the existence of a large refill market must inhibit the plaintiff's ability to raise prices. The other side of the coin is the fact that one of the reasons why the defendant's refilling business failed was because the plaintiff did not keep its prices sufficiently high to allow the defendant's refilled cartridges to make any substantial inroads into its market.

Their Lordships are accordingly of the opinion that the features of unfairness and abuse of monopoly power which underlay the decision in *British Leyland* cannot be said to be plainly and obviously present in this case. The analogy with repair is not strong enough to bring the case within the exceptional doctrine which the House of Lords propounded. Since, as their Lordships have said, the whole question of copyright is before the Legislative Council, it would not be appropriate to extend that doctrine further than it can legitimately be sustained. They will therefore humbly advise Her Majesty that the appeal should be allowed and the decision of Rogers J on the copyright issue restored. The respondent must pay the appellant's costs in the Court of Appeal and before their Lordships' Board.